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OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

PLAINTIFF'S REPLY BRIEF

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PLAINTIFF'S REPLY BRIEF

Following the lead of Congress, the defendant's brief construes the decision of *Katzenbach v. Morgan*, 384 US 641 (1966) far more broadly than is justified by the Court's careful reasoning of that decision. Such an extended interpretation offends the most basic principles of constitutional law.

UNEQUAL PROTECTION AS THE PREDICATE FOR SECTION 5

Katzenbach v. Morgan recognizes at the outset that the Constitution grants to the States the right to control the franchise to the point of conflict with constitutional guarantees of liberty such as the Fourteenth Amendment. 384 US at 647. The Equal Protection Clause is a restriction upon the States. It is an affirmative grant of power to Congress only as it authorizes that body "to *enforce* the prohibitions by appropriate legislation." 384 US at 648 (original emphasis). Implicit and essential in the reasoning of *Katzenbach v. Morgan* is the proposition that Congress is authorized to act by § 5 of the Fourteenth Amendment only where there is some basis for a congressional determination that there exists an actual or potential condition which is offensive to the Equal Protection Clause.

To sustain the legislation, it is not enough under the rationale of *Katzenbach v. Morgan*, as defendant argues from isolated sentences in that opinion, that the Court perceive a mere basis for the legislation. The Court must perceive a constitutional basis for the congressional de-

termination that invidious discrimination offensive to equal protection exists. Then the Court must inquire whether a basis exists for the congressional determination that the legislative remedy tends to effectuate the ends of the Equal Protection Clause by the eradication of such discrimination.

The doctrine of judicial review remains viable. A congressional determination that a problem of equal protection exists, though entitled to respect, is not binding upon the Court. While Congress may define the conflicts and fashion the remedies, it is for the Court to define the contours of the Equal Protection Clause and set the outer limits within which Congress may act. As stated in the well-reasoned preliminaries of *Christopher v. Mitchell*, Civil No. 1862-70 (DC, Oct. 2, 1970) slip opinion pp. 20-21:

> "* * * As the often repeated quote from Justice Marshall specifies, a court must make the initial—and independent—judgment whether the evil attacked by Congress is one which comes within the scope of the Equal Protection Clause. * * * Only after these preliminary decisions does the loose 'able-to-perceive-a-basis' test enter as the standard for review of the appropriateness of the means Congress has chosen." (footnote omitted)

Or, to use defendant's analogy from *Katzenbach v. McClung*, 379 US 294 (1964) (Def. Br. 13), while Congress may determine what affects interstate commerce and legislate under the Necessary and Proper Clause, it remains always for the Court to define interstate commerce and by doing so describe the constitutional parameters of congressional authority.

Chief Justice Marshall's classic formulation of the extent of congressional powers in *M'Culloch v. Maryland*, 4 Wheat 316, was expressly predicated upon the requirement that the end of the legislation "be within the scope of the Constitution" and that determination does not end at the doors of Congress; it was then and remains subject to judicial review.

This Court in *Katzenbach v. Morgan* did not in any sense yield to the Congress its responsibility to independently determine whether the legislation under examination was related to a condition which could be found to be offensive to the Equal Protection Clause. The Court found that there was a basis for Congress to have determined that extension of the franchise to Puerto Rican-educated citizens might enable them to rectify by political means a condition of invidious discrimination, mainly "the risk or pervasveness of the discrimination in governmental services" 384 US at 653. In its second inquiry, the Court perceived a basis upon which Congress could have determined that the exclusion of non-English educated voters was the direct product of intentional and thus "invidious discrimination in violation of the Equal Protection Clause against citizens of Puerto Rican origin. 384 US 656.

Title III, its history and its effect, cannot be upheld upon the basis of an inquiry parallel to that in *Katzenbach v. Morgan*.

The First Rationale of *Katzenbach v. Morgan*

The first rationale of *Katzenbach v. Morgan* is that

Congress may broaden the franchise as a means to remedy unrelated governmental denials of equal protection. It is from this portion of the opinion that the defendant mistakenly argues (Gov't Ariz Br 26-27; Def Br 12) that this Court held that it need not find a real or potential denial of equal protection in order to sustain the legislation. To the contrary, that sentence of the opinion referred only to the first rationale and the opinion made clear that a discriminatory voting law was not a necessary predicate to federal action where the franchise could be used as a device to remedy other governmental discrimination. In either event, the federal legislation must be predicated upon a perceived violation of equal protection, whether directly or indirectly attacked.

The defendant and the congressional proponents offer a list of legislative reasons to support Title III as conditions to be remedied by franchise extension to 18 year olds, but they offer no description of conditions which are offensive to the Equal Protection Clause:

1. *Liability for Conscription.* There is no claim that liability for conscription is an invidious discrimination offensive to the Equal Protection Clause. Even were it so, it is a discrimination of Congress' making, not that of the States'.

2. *Entry into the workforce.* The entry of 18-year-olds into the workforce and the assumption by them of civic responsibility, is not a condition offensive to the Equal Protection Clause. Further, we suggest that the pursuit of universal education in the last century has

reduced the proportion of 18-year-olds in the workforce to a lesser number than at the time of the adoption of the Fourteenth Amendment, which assumes 21 to be the minimum voting age.

3. *Liability to taxation.* The liability of 18-year-olds to taxation to the same degree as other citizens both younger and older, is not a denial of equal protection.

4. *Entitlement to drink alcoholic beverages.* The fact that some States allow 18-year-olds to drink is not a denial of equal protection.

5. *Competency to marry.* The allowance of 18-year-olds to marry in most States is not a denial of equal protection.

6. *Higher degree of education.* The fact that a greater number of young people are better educated today than ever before is not a denial of equal protection.

7. *Elimination of the "generation gap."* The existence of a so-called "generation gap" may offend sensitivities, but not the Equal Protection Clause.

In sum, the reasons offered for passage of Title III are legislative reasons. They are not descriptions of situations offensive to the Equal Protection Clause to be remedied by extension of the franchise.

The Second Rationale of *Katzenbach v. Morgan*

Neither can Title III be upheld under the second rationale of *Katzenbach v. Morgan*, because there is no basis for a congressional determination that the 21-year minimum age requirement for voting is itself an invidious discrimination against excluded citizens. Whereas

the Court perceived that Congress could have determined that the exclusion of Puerto Ricans was intentional and invidiously discriminatory by judicially determined standards, no such basis exists here and the *ipse dixit* of neither the defendant nor the congressional proponents makes it so.

It cannot be challenged that the States have a legitimate interest in assuring responsibility and maturity in the exercise of the franchise. That legitimate state interest is of a far higher dignity than any interest a state may have in excluding Puerto Rican-educated citizens from the franchise. This Court perceived a finding of the latter condition to be "invidious discrimination in violation of the Equal Protection Clause." 384 US at 656. Reasonable classification by age is neutral in classical Fourteenth Amendment terms of race and national origin.

The defendant virtually acknowledges that protection of state interest by setting of the minimum voting age at 21 is a reasonable classification, but claims that this Court owes great deference to the congressional decision that a different age is more desirable. It cannot be said that the use by a State of the same minimum voting age as that comprehended by the authors of the Fourteenth Amendment itself is unreasonable, arbitrary, invidious, or discriminatory. As Professor Wechsler observed in his letter to The President, "age is obviously not irrelevant to qualifications; and since any age criterion involves the drawing of an arbitrary line fixing the age at twenty-one most certainly is not 'capricious.'"

116 Cong Rec 5649 (daily ed. June 17, 1970). Title III cannot be said to be "consistent with 'the letter and spirit of the Constitution.'" (384 US at 651) because it strikes at state legislation which is consistent with both the letter and spirit of the very amendment which defendant asserts to justify it.

Finally, a distinction based upon a reasonable age classification alone does not trigger the authority of Congress to act under the Equal Protection Clause and Section 5. Otherwise, Congress could usurp State legislatures in any statutory field where reasonable classifications are established by simply disagreeing with the legislative rationale of the state. The Fourteenth Amendment does not authorize congressional entry into areas of state concern (Pl. Br. 20-21) merely because reasonable legislators can differ.

Defendant's Last Argument

Defendant's last argument that the State remains free to extend the franchise to those aged 17, 16 or some lesser age renders hollow the oft repeated disclaimer by this Court that States are free to establish basic qualifications for voters and that age is one of the "obvious examples" of such qualifications within the competence of the States. See, *e.g.*, *Lassister v. Northampton County Bd. of Elections*, 360 US 45 (1959). The defendant's generous conception of the States' prerogative to lower the voting age to 16 leaves the States with little real discretion beyond checking the voters rolls against the coroner's rolls. Title III, as illuminated by the defend-

ant's description of the State's prerogatives (Def. Br. 20-21 and Fn 17) leaves Art. I, § 2, of the Fourteenth Amendment, and the Seventeenth Amendment intact in form but devoid of substance.

CONCLUSION

Title III is not appropriate legislation under § 5 of the Fourteenth Amendment because the ends to be effectuated by lowering the voting age do not relate to conditions prohibited by the Equal Protection Clause of the Fourteenth Amendment. Upon independent judicial review, there is no basis to support a congressional finding that a minimum voting age of 21 is an invidious discrimination or that extending the franchise to the 18 through 20 year old group would effect the remedy of conditions of invidious discrimination. Defendant's brief has not demonstrated to the contrary. Therefore, Title III should be declared unconstitutional and the defendant restrained from enforcing that portion of the Act.

Respectfully submitted,

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